88-593

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CARLOS EFRAIN TRUJILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether or not Petitioner can be sentenced for knowingly or intentionally possessing a controlled substance with intent to distribute it, in violation of Title 21 United States Code section 841(a)(1), when the jury was instructed and found beyond a reasonable doubt only that Petitioner possessed a controlled substance with intent to distribute it, in violation of 21 United States Code section 959(b)(2), a section for which Congress neglected to enact a sentencing provision.

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CARLOS EFRAIN TRUJILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Carlos Efrain Trujillo ("Trujillo"),[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For the Fourth Circuit, entered in the above-entitled proceeding on June 8, 1988.

OPINIONS BELOW

The panel opinion of the Court of Appeals For the Fourth Circuit (App. 1a) is recorded at 851 F.2d 111.

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[1] Pursuant to Rule 28.1, Trujillo declares that the only other party to the proceedings below was John Carlos Massuet who was the co-defendant and co-appellant in the district court and court of appeals, respectively, but who has not joined in the instant petition.

The order denying the request for rehearing and suggestion for in banc review has not been published. (App. 12a-13a)

JURISDICTION

The Court of Appeals issued its opinion and judgment on June 8, 1988. The Court of Appeals denied the request for rehearing and in banc suggestion on August 11, 1988, and this Petition is filed within sixty (60) days thereof. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of the law. . . .

Title 21, United States Code section 841(a)(1) provides:

> (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .

Title 21, United States Code section 959(b)(2) provides:

> (b) It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to—
>
> . . .
>
> (2) possess a controlled substance with intent to distribute.

Title 21, United States Code section 960 provides in pertinent part:

> (a) Any person who—
>
> . . .
>
> (3) contrary to section 1009 [21 U.S.C.S. section 959], manufactures or distributes a controlled substance,
>
> shall be punished as provided in subsection (b).

STATEMENT OF THE CASE

Petitioner, Carlos Efrain Trujillo, is a Columbian citizen who, on June 17, 1987, was charged in an indictment with various offenses concerning the importation and possession of cocaine. Count Four of the indictment charged that Petitioner on board an aircraft registered in the United States knowingly and intentionally possessed cocaine with intent to distribute the same in violation of 21 U.S.C. sections 959(b)(2) and 960.[2]

Jury trial began on August 24, 1987, with the case going to the jury on September 2, 1987. With regard to Count Four, the district court charged the jury that Petitioner could be found guilty:

> only if all of the following facts are proved beyond a reasonable doubt:
>
> First, that the defendant you are considering was not a United States citizen;

---

[2] In addition, the indictment charged the Petitioner with the following:

(1) Failing to comply with advance notification, arrival and reporting requirements while piloting an aircraft containing narcotics, in violation of 19 U.S.C. section 1436;

(2) Aviation smuggling, in violation of 19 U.S.C. section 1590; and

(3) Attempted importation of cocaine, in violation of 21 U.S.C. sections 960 and 963.

See App. 3a-4a.

> Second, that the defendant you are considering was on board an aircraft owned by a United States citizen or the aircraft was registered in the United States; and
>
> Third, that he possessed the substance with the intent to distribute it.

(App. 22a; *see also* App. 23a). No objection was entered by defense counsel as to the correctness of this charge concerning the section 959(b)(2) violation. The jury found Petitioner guilty of Count Four.[3]

Sentencing took place on November 9, 1987, and Petitioner received a ten (10) year sentence on Count Four. Petitioner appealed the district court's sentence of ten (10) years as to Count Four in light of the fact that there was no sentencing provision enacted by Congress regarding 21 U.S.C. section 959(b)(2). *See* 21 U.S.C. section 960(a)(3). On appeal, with respect to such a sentence, the Fourth Circuit Court of Appeals pointed out that "[t]he government acknowledges that the district court lacked statutory authority to sentence . . . [Petitioner] for violating 21 U.S.C. section 959(b)(2)." (App. 7a). In addition, the court of appeals agreed and held that Petitioner had correctly asserted that he could not be sentenced for a violation of section 959(b)(2). (App. 8a). However, the court of appeals went on to hold that Petitioner could be sentenced for a violation of 21 U.S.C. section 841(a)(1). (App. 11a).

In this regard, the court of appeals found that section 841(a)(1) is similar to section 959(b)(2). (App. 8a). Further, the court found that "the language contained in the indictment was . . . a virtual recitation of [a] section 841(a)(1)" violation. *Id.* Significantly, the court of appeals also held that "the jury found all of the elements and a jurisdictional base necessary to establish

---

[3] The jury also found Petitioner guilty of violations of 19 U.S.C. section 1590 and 21 U.S.C. sections 960 and 963. The district court dismissed the count alleging a 19 U.S.C. section 1436 violation. *See* App. 14a-15a, and, *supra* note 2.

. . . [Petitioner's] guilt for violating section 841(a)(1) even though the indictment did not cite section 841(a)(1)." (App. 8a-9a).

Finally, the court of appeals held that the indictment was valid and that Petitioner suffered no prejudice due to the citation of section 959(b)(2) therein. Thus, the court found that the citation to section 959(b)(2) did not invalidate the prosecution or prevent punishment for a section 841(a)(1) violation. (App. 11a). Thereupon, the court of appeals remanded the case to the district court with directions to vacate those portions of the judgment that imposed a sentence for violation of section 959(b)(2) and to resentence Petitioner pursuant to 21 U.S.C. section 841(b) for a violation of section 841(a)(1). *Id.*

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case for two reasons, both of which flow directly from the Fourth Circuit Court of Appeals' decision that Petitioner can be sentenced as if he had been convicted of a violation of 21 U.S.C. section 841(a)(1). First, and most importantly, the court of appeals' decision violates constitutional requirements of due process. Second, the court of appeals' decision is in direct conflict with decisions of other circuit courts which have held that among the essential elements constituting a section 841(a)(1) violation is the element of "knowingly or intentionally."

Both of the foregoing reasons for granting the writ center on the fact that when the district court charged the jury below, it instructed that Petitioner could not be found guilty of violating Title 21, United States Code section 959(b)(2) unless the government proved three things beyond a reasonable doubt: (1) that Petitioner was not a United States citizen, (2) that Petitioner was on board an aircraft owned by a United States citizen or registered in the United States, and (3) that Petitioner possessed a controlled substance with the intent to dis-

tribute it. (App. 22a and 23a). In conjunction therewith is the court of appeals holding that by finding such elements beyond a reasonable doubt, the jury found all the elements necessary to establish Petitioner's guilt of a 21 U.S.C. section 841(a)(1) violation. By so holding, the court of appeals, in essence, held that "knowingly or intentionally" is not an essential element of section 841(a)(1).

Such a holding clearly does not correctly define 21 U.S.C. section 841(a)(1). In this regard, the straightforward language of section 841(a)(1) requires that the defendant "knowingly or intentionally . . . possess with intent to . . . distribute . . . a controlled substance . . ." 21 U.S.C. section 841(a)(1).

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS VIOLATES CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS

The due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). This standard of proof beyond a reasonable doubt of every fact necessary to constitute the crime protects "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' "—the presumption of innocence. *In Re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, ——, 25 L.Ed.2d 368, 375 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, ——, 39 L.Ed. 481, 491 (1895)). Thus, it is Petitioner's position herein that in order for one to be punished for a criminal offense, constitutional requirements of due process require that all essential elements of the crime be proven beyond a reasonable doubt. *Cf. Christoffel v. United States*, 338 U.S. 84, 69 S.Ct. 1447, 93 L.Ed. 1826 (1949).

In *Christoffel*, the Court held that:

> We are measuring a conviction of a crime by the statute which defined it. As a consequence of this conviction, Petitioner was sentenced to imprisonment for a term of from two to six years. An essential part of a procedure which can be said fairly to inflict such punishment is that all of the elements of the crime charged shall be proven beyond a reasonable doubt.

338 U.S. at 89, 69 S.Ct. at ——, 93 L.Ed. at 1831. Thereupon the Court pointed out that the conviction of a defendant upon less than all essential elements constituting the criminal offense charged, denies such a person a fundamental right. *Id.* at 90, 69 S.Ct. at ——, 93 L.Ed. at 1831. Indeed, such has been clear, at least since *In Re Winship, supra*, wherein the Court removed all doubt and held that an accused is protected against conviction of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at ——, 25 L.Ed.2d at 375.

Sub judice, the court of appeals held that the indictment fairly and unprejudicially charged Petitioner with a violation of 21 U.S.C. section 841(a)(1) even though section 841(a)(1) was not cited therein. Petitioner does not challenge this holding. In fact, the sufficiency of the underlying indictment has never been challenged—either as regards a section 959(b)(2) violation or, now, as regards section 841(a)(1). Notwithstanding the validity of the indictment vis-a-vis section 841(a)(1), it is Petitioner's contention that he cannot be punished therefor, within constitutional parameters, as the court of appeals has held.

In this regard, Petitioner contends that the crime which the court of appeals has held Petitioner can be sentenced was never adequately defined for the jury to consider and either find beyond a reasonable doubt or not.

The offense which was defined by the district court for the jury's consideration was that crime set out in 21 U.S.C. section 959(b)(2). Section 959(b)(2) may be similar to 21 U.S.C. section 841(a)(1) but the two offenses have differences. Of substantial difference herein is the fact that among the elements of section 841(a)(1) is the element of "knowingly or intentionally." Such is not an element of section 959(b)(2) and was not charged to the jury which convicted Petitioner.

Thus, petitioner contends that the failure to have a jury consider such an element prevents the imposition of sentence for a section 841(a)(1) violation. *Cf. Rose v. Clark*, 478 U.S. ——, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (Under the United States Constitution the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged, the purpose of which is to insure that only the guilty are criminally punished.); *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) (Failure to instruct the jury on each and every essential element of the offense charged constitutes reversible error.); *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (The jury is to be instructed on each and every essential element of the offense charged.).

Accordingly, for the foregoing reasons, Petitioner contends that the Fourth Circuit Court of Appeals' decision violates due process requirements.

II. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

The Fourth Circuit Court of Appeals' decision that Petitioner can be sentenced for a section 841(a)(1) violation includes, as has been discussed, the conclusion that "knowingly and intentionally" is not an essential element of 21 U.S.C. section 841(a)(1). In addition to infring-

ing upon Petitioner's right to due process, such a holding is in direct conflict with other circuit court decisions which have considered the essentials of section 841(a)(1).

In this regard, the court in *United States v. James*, 555 F.2d 992 (D.C.Cir. 1977), concluded that the essential elements of a 21 U.S.C. section 841(a)(1) violation are "the (a) knowing (b) possession of [a controlled substance] with (c) intent to distribute it." *Id.* at 999. Moreover, the court in *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973), concluded that the elements of "knowing possession" and "intent to distribute" are separate and distinct elements and that a jury charge which confuses the two is legally insufficient. *Id.* at 249. In *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977), the court explained the distinction between the "knowingly or intentionally" element and the "intent to distribute" element:

> The "knowingly" and "intentionally" language in section 841(a) refers to the possessor's awareness that he is in possession of a controlled substance and not to his intention to distribute the substance sometime in the future. 21 U.S.C. section 841(a)(1) requires both general criminal intent and the specific "intent to distribute" before a violation is proven. See *United States v. Clark*, 475 F.2d at 248. As the Ninth Circuit correctly stated in *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976), 21 U.S.C. section 841(a)(1) "is violated only if possession is accompanied both by knowledge of the nature of the act and also by the intent 'to manufacture, distribute, or dispense.'"

Id. at 670.

As the foregoing cases point out, "knowledge" is a separate and distinct element of section 841(a)(1). In the case at bar, the district court clearly did not charge the jury that it must find this "knowing" element beyond a reasonable doubt before it could find Petitioner guilty.

Notwithstanding such failure, the court of appeals held that all essential elements of section 841(a)(1) had been found. This holding is clearly in conflict with the foregoing cases in this respect.[4]

Also indicative of the view other circuits have with regard to the elements of section 841(a)(1) are the various pattern jury instructions covering the same. Specifically, the Pattern Instructions of the Eleventh Circuit District Judges Association, the Committee on Federal Criminal Jury Instructions of the Seventh Circuit, the Committee on Model Jury Instruction for the Ninth Circuit, and the Federal Judicial Center each require "knowledge" as an element in addition to and distinct from "intent to distribute." *See* Pattern Jury Instructions—Criminal Cases, Number 45 (1985 Ed); Federal Criminal Jury Instructions of the Seventh Circuit, Vol. III, p. 118 (1986); Manual of Model Jury Instructions for the Ninth Circuit, section 9.03A (1985 Ed.); Pattern Criminal Jury Instructions, Number 112 (1988 Ed.).

Accordingly, for the foregoing reasons, Petitioner contends that the Fourth Circuit Court of Appeals' decision

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[4] See also the following cases which have dealt with the "knowledge" element in section 841(a)(1): United States v. Seelig, 622 F.2d 207 (6th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980) (Deliberate ignorance instruction); United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977) (Instruction that the required knowledge is established if accused was aware of high probability of the existence of a fact in question unless he actually believed it did not exist should be given in only rare cases); United States v. Esquer-Gamez, 550 F.2d 1231 (9th Cir. 1977) (Instruction to the effect that requisite element of "knowledge" is established if accused was aware of high probability that a package contained contraband is error where, over objection, court failed to include instruction that accused was entitled to acquittal if he actually believed package did not contain contraband); United States v. Jewell, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976). (Instruction dealing with defendant's conscious purpose to avoid learning the truth).

is in conflict with decisions of other circuit courts regarding "knowledge" as an element of section 841(a)(1).

CONCLUSION

While the situation which gave rise to the court of appeals' decision in the case at bar is quite rare—Congress neglecting to enact a sentencing provision for a criminal proscription—the decision itself has far-reaching and devastating implications. The Fifth Amendment to the Constitution of the United States provides that one shall not be deprived of one's liberty without due process of law. This fundamental right is violated when one is convicted upon proof beyond a reasonable doubt of less than all essential elements of the crime charged. *See, e.g., Brinegar v. United States, supra; In Re Winship, supra; Christoffel v. United States, supra.*

In the case *sub judice*, the court of appeals has ordered that Petitioner be sentenced for a crime which was not charged to the jury and, therefore, which not all necessary elements have been proven beyond a reasonable doubt. Thus, the court of appeals' decision stands for the proposition that one can be punished for a crime even though that crime has not been proven beyond a reasonable doubt. The decision thereby attacks the very heart of our criminal jurisprudence—the presumption of innocence.

Another far reaching implication of the court of appeals decision below is that the conclusion reached therein, that "knowingly and intentionally" is not an essential element of 21 U.S.C. section 841(a)(1), conflicts with decisions of other circuits. This conflict concerns the serious issue of what exactly is required for a section 841(a)(1) violation. Petitioner contends that this conflict among the circuits is serious enough to warrant review by this Court.

Accordingly, both from the standpoint of constitutional law principles and from the standpoint of uniformity among the federal courts, the court of appeals' decision merits review and reversal by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5672

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOHN CARLOS MASSUET,
Defendant-Appellant

No. 87-5673

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CARLOS EFRAIN TRUJILLO,
Defendant-Appellant

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington
W. Earl Britt, Chief Judge. (CR-87-15)

Argued: May 5, 1988 Decided: June 30, 1988

Before WILKINSON, Circuit Judge, BUTZNER, Senior Circuit Judge, and GORDON, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

John L. Coble, Jeffrey L. Zimmer (ZIMMER & ZIMMER; Robert M. Leen; John Milton McDaniel on brief) for Appellants. John F. DePue (DEPARTMENT OF JUSTICE; Margaret P. Currin, United States Attorney; Christine M. Dean, Assistant U.S. Attorney on brief) for Appellee.

BUTZNER, Senior Circuit Judge:

John Carlos Massuet and Carlos Efrain Trujillo were tried and convicted of various drug charges after Customs officials thwarted their attempt to smuggle cocaine by aircraft into the United States. Massuet and Trujillo challenge several of the district court's rulings relating to the admissibility of evidence and claim that the district court improperly sentenced them following their convictions. We affirm the convictions and remand the case to the district court for resentencing on two counts.

I

Massuet was the pilot of a Cessna aircraft. Trujillo was his passenger. A Customs radar operator picked up their aircraft in the vicinity of Port-au-Prince, Haiti. Its apparent point of departure was Colombia. Customs pilots followed Massuet and Trujillo as they proceeded north along the eastern border of the United States. The surveilling pilots observed the Cessna maneuver erratically and alter its airspeed and altitude after it crossed the coastline in the vicinity of Wilmington, North Carolina. The Cessna flew over a dirt airstrip, then proceeded

eastward over the ocean. At this point, one of its occupants began to discard documents and dark covered packages from the aircraft. A Customs pilot obtained the Cessna's tail number and signaled Massuet to land the aircraft. Massuet landed at New Hanover County, North Carolina Airport, where he and Trujillo were arrested and the Cessna seized.

A government witness testified that an arresting officer read Massuet and Trujillo *Miranda* warnings and then asked them questions about their backgrounds, which they answered. The two then refused to answer further questions.

A Customs pilot relayed to the Coast Guard the approximate coordinates where Massuet and Trujillo were seen discarding the packages and documents from their aircraft. The commanding officer of a Coast Guard vessel, relying on his knowledge of the ocean's currents, conducted a search and recovered 49 brown covered packages from the ocean in a location approximately 2½ miles from where Massuet or Trujillo was seen discarding similar packages. The packages contained approximately $19,600,000 worth of cocaine. A drug detecting dog indicated a residual odor from the recent storage of unlawful drugs in the tail section of Massuet's aircraft. A search of the aircraft revealed an aerial map with marked coordinates corresponding to the dirt airstrip which Massuet and Trujillo flew over after entering North Carolina. Documents in the aircraft disclosed that the Cessna was registered in the United States.

Massuet and Trujillo were indicted for failing to comply with advance notification, arrival, and reporting requirements while piloting an aircraft containing narcotics, in violation of 19 U.S.C. § 1436, for aviation smuggling in violation of 19 U.S.C. § 1590 and attempted importation of cocaine in violation of 21 U.S.C. §§ 960 and 963. Count III charged that Massuet, a United States

citizen on board an aircraft, knowingly and intentionally possessed with intent to distribute cocaine in violation of 21 U.S.C. §§ 959(b)(2) and 960. Count IV charged that Trujillo on board an aircraft registered in the United States knowingly and intentionally possessed cocaine with intent to distribute in violation of 21 U.S.C. §§ 959(b)(2) and 960.

Massuet and Trujillo moved to suppress the statements they made to Customs officials immediately after their arrest. The district court denied the motion. Customs agents testified that Massuet and Trujillo made the statements in question and that they refused to answer additional questions without consulting an attorney. The district court permitted the testimony but instructed the jury to "not take in any way against" Massuet and Trujillo the fact that they invoked their constitutional rights after their arrest. The court also overruled Massuet's and Trujillo's objection to the search of their aircraft and admitted the contents of the search, including the aerial map and the aircraft's registration documents. Finally, the court permitted testimony, over the defendants' objections, relating to the value of the cocaine seized and the effects of cocaine upon the human body.

Massuet was convicted on all counts, and Trujillo was convicted on all counts except the count alleging a violation of 19 U.S.C. § 1436, because he was not the pilot of the aircraft.

II

Massuet and Trujillo challenge their convictions on several grounds. First, they maintain that the district court erred by allowing government witnesses to testify that they chose to remain silent and demanded an attorney after they were given *Miranda* warnings when they were arrested.

Prosecution witnesses should not have been permitted to testify over objection about the defendants' silence

after receiving *Miranda* warnings. Drawing upon its precedents, the Supreme Court recently reiterated that "breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." Wainwright v. Greenfield, 474 U.S. 284, 291 (1986).

The government relies on Anderson v. Charles, 447 U.S. 404 (1980), and similar cases to sustain admission of the testimony about the defendants' refusal to answer questions and their request for an attorney. But *Anderson* dealt with a situation quite different from this case. In *Anderson* the defendant gave a statement about his theft of a car after receiving *Miranda* warnings. On direct examination his version of the theft was inconsistent with his earlier statements. He was cross-examined about this discrepancy and asked why he had not told the arresting officers his present version of the theft. The Court held that the cross examination did not violate the Due Process Clause because "[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." 447 U.S. at 409.

Here, in contrast, Massuet and Trujillo made no statement about the cocaine after they received *Miranda* warnings. Instead they gave background information about their roles in piloting the aircraft, their national origins, citizenship, and legal basis for being in the United States. Furthermore, they did not testify. The testimony about their silence was introduced during the government's case in chief. It is quite apparent that *Anderson* and its progeny do not support the government's argument that the testimony was admissible.

Nevertheless, applying the criteria that this court explained in Williams v. Zahradnick, 632 F.2d 353, 361-62 (4th Cir. 1980), it is clear that the error was harmless. First and most importantly, it cannot be said that evidence of the defendants' silence was offered to impeach

their testimony or to refute any exculpatory defense. Thus, this is quite different than the situation in *Wainwright* and *Zahradnick*, where the defendants were prejudiced by having their silence used against them to destroy their credibility. Applying the other *Zahradnick* criteria, it appears that the testimony about the defendants' silence was given on two isolated occasions and the prosecutor did not refer to it in closing argument. The district court gave the jury a firm curative instruction about not holding the defendants' exercise of their constitutional rights against them in any way. Overwhelming other evidence pointed to Massuet's and Trujillo's guilt.

Massuet and Trujillo also argue that the evidence of the aircraft's United States registry was obtained illegally and consequently their convictions for violating 21 U.S.C. § 959(b)(2) must be reversed. They claim that Customs officials acted unreasonably by conducting a warrantless search of the aircraft two days after seizing it.

The aircraft was legally seized. In United States v. Johns, 469 U.S. 478, 484 (1985), the Court said:

> [t]here is no requirement that a warrantless search of a vehicle occur contemporaneously with its lawful seizure. . . . A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search. (citations omitted).

In addition, officers may conduct a warrantless search of a vehicle seized for forfeiture under 21 U.S.C. § 881(a) for carrying contraband. United States v. $29,000—United States Currency, 745 F.2d 853, 856 (4th Cir. 1984).

Massuet and Trujillo claim that the 49 packages containing cocaine were improperly admitted as evidence

against them. They assert that the government made an insufficient showing that the cocaine was connected to them.

There was ample circumstantial evidence connecting the cocaine to Massuet and Trujillo. Customs pilots testified that they observed one of the two discarding very similar packages from the aircraft in a location near the area where the Coast Guard found the cocaine. A drug detecting dog alerted officials to the recent existence of illegal drugs in the rear of the aircraft. Physical evidence may be connected to a defendant through circumstantial evidence, United States v. Sarmiento-Perez, 724 F.2d 898, 900 (11th Cir. 1984), and the quantum of proof that physical evidence is connected to a defendant "goes to the weight of the physical evidence rather than its admissibility." United States v. Soto, 591 F.2d 1091, 1099-1100 (5th Cir. 1979). The district court did not abuse its broad discretion conferred by Federal Rule of Evidence 403 when it admitted the evidence.

Finally, we reject Massuet's and Trujillo's claims that the district court erred by permitting testimony regarding the value of the cocaine seized and the effect of cocaine on the human body. The value of the cocaine was relevant to prove that Massuet and Trujillo intended to distribute the drug. *See* United States v. Sheikh, 654 F.2d 1057, 1067 (5th Cir. 1981). The evidence of the effect of cocaine was relevant to demonstrate that cocaine was a narcotic, and, in any event, the chemist's brief description of its effect was not prejudicial to Massuet and Trujillo because the other evidence against them was overwhelming.

III

The government acknowledges that the district court lacked statutory authority to sentence Massuet and Trujillo for violating 21 U.S.C. § 959(b)(2). Section 959 (b)(2) prohibits any United States citizen on any air-

craft and any person on board an aircraft registered in the United States to "possess a controlled substance with intent to distribute." Section 960 of 21 U.S.C., the statute prescribing the sentence for a violation of section 959, however, appears only to apply to section 959(b)(1), which prohibits the manufacture and distribution of a controlled substance, not possession with intent to distribute. Thus, because Massuet, a United States citizen, and Trujillo, a person on an aircraft registered in the United States, were convicted of possession with intent to distribute, they correctly assert that they cannot be sentenced for violating section 959(b)(2).

Nevertheless, 21 U.S.C. § 841(a)(1) is virtually identical to section 959(b)(2) and includes a provision for sentencing in section 841(b). Section 841(a)(1) makes it unlawful for any person knowingly or intentionally to "possess with intent to . . . distribute . . . a controlled substance . . ." anywhere the United States has jurisdiction. *See United States v. Arra*, 630 F.2d 836, 840 (1st Cir. 1980). The elements of the crime denounced in sections 959(b)(2) and 841(a)(1) are similar. The jurisdictional base of section 841(a)(1) is broad enough to encompass the jurisdictional base of section 959(b)(2).

The grand jury charged, in count III that Massuet and in count IV that Trujillo "did . . . knowingly and intentionally possess with intent to distribute a . . . controlled substance," in violation of section 959(b)(2). This language in the indictment was also a virtual recitation of section 841(a)(1). The district court charged the jury to find Massuet and Trujillo guilty under counts III and IV if it concluded that they "possessed some controlled substance with the intent to distribute it" and they were "on board an aircraft . . . registered in the United States." Thus, by convicting Massuet and Trujillo the jury found all of the elements and a jurisdictional base necessary to establish their guilt for violating

section 841(a)(1) as well even though the indictment did not cite section 841(a)(1).

A similar situation arose in Williams v. United States, 168 U.S. 382 (1897). In *Williams*, the defendant, a Treasury Department official, extorted one hundred dollars from a person of Chinese descent attempting to enter the United States. The government intentionally indicted Williams for violating section 3169 of the Revised Statutes upon the erroneous belief that his conduct was proscribed by that provision. The Supreme Court concluded that the statute under which Williams was indicted applied only to officers acting under the authority of revenue laws but declared that the indictment was valid because Williams's alleged conduct was prohibited by another statute, section 5481. The Court gave the following explanation of its ruling:

> It is said that these indictments were not returned under that statute, and that the above indorsement on the margin of each indictment shows that the District Attorney of the United States proceeded under other statutes that did not cover the case of extortion committed by a Chinese inspector under color of his office. It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offence under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offence charged was covered by a different statute.

168 U.S. at 389. In dicta, the Court indicated that the proper procedure for dealing with the problem of the erroneously cited statute would be to remand the case

for resentencing under the proper statute. 168 U.S. at 389.

Rule 7(c)(3) of the Federal Rules of Criminal Procedure has adopted the reasoning of the Supreme Court in *Williams*. The rule provides that "[e]rror in the citation [of the statute which the defendant allegedly violated] or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." The Notes of the Advisory Committee to Rule 7(c)(3), citing *Williams*, make clear that "[t]he law at present regards citations to statutes or regulations as not a part of the indictment. A conviction may be sustained on the basis of a statute or regulation other than that cited." *See also* United States v. Lipkis, 770 F.2d 1447, 1452 (9th Cir. 1985). Rule 7(c)(3) is perhaps most frequently cited to avoid dismissal of indictments because of clerical or inadvertent error. But as *Williams* teaches, the rule's scope is not limited to these causes of miscitation. In *Williams*, as here, the prosecutor intentionally cited an inappropriate statute, but the fortuity of an appropriate statute proscribing conduct charged in the indictment sustained the prosecution.

Imposing sentence on Massuet and Trujillo for violating section 841(a)(1) is not barred by Stirone v. United States, 361 U.S. 212 (1960), which prohibits a conviction for an offense different from the one specifically charged by the grand jury. In that case, the indictment charged that the defendant violated the Hobbs Act by impeding the flow of sand through interstate commerce to a Pennsylvania steel mill, but the government sought to establish the interstate commerce nexus by offering proof that the defendant's activity also impeded the future flow of steel from the mill to other states. The Supreme Court held that the government could not prove a violation of the Hobbs Act under the

latter theory because the indictment charged the defendant with impeding the present flow of sand, not the future flow of steel, through interstate commerce and he was not "charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge" in an indictment with impeding the future flow of steel. 361 U.S. at 218.

Massuet and Trujillo were indicted for possession of cocaine with intent to distribute. In contrast with the situation disclosed by *Stirone*, the government did not attempt to offer any evidence in support of any other charge. If the indictment had included the exact language which it did but cited section 841(a)(1) instead of section 959(b)(2) or even no statute at all, it would have been valid and any challenge against it would have failed. The indictment conformed to Federal Rule of Criminal Procedure 7(c)(1). It informed the defendants of the essential facts constituting the offense charged. Consequently, citation of section 959(b)(2) did not prejudice the defendants or invalidate the prosecution. *Williams*, 168 U.S. at 389; Rule 7(c)(3).

Our opinion addresses the unusual situation where Congress has prohibited the same conduct in two statutes but specified punishment only in one. It is not to be read as authorizing the district court to pick and choose for the purpose of sentencing between two applicable statutes each with its own provision for punishment when the government has elected to prosecute on one of the two. *See* United States v. Batchelder, 442 U.S. 114 (1979).

We remand the case to the district court with directions to vacate those portions of the judgments that imposed sentences for violations of section 959(b)(2) and to conduct proceedings for resentencing the defendants pursuant to section 841(b) for violation of section 841(a)(1). In all other respects the judgments are affirmed.

AFFIRMED IN PART AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5673

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARLOS EFRAIN TRUJILLO,
Defendant-Appellant.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

[Filed Aug. 11, 1988]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Senior Judge Butzner, with the concurrence of Judge Wilkinson and Judge

Gordon, Senior United States District Judge sitting by designation.

For the Court

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

Docket No. 87-15-02-Cr-7
Wilmington Division

UNITED STATES OF AMERICA

vs.

CARLOS EFRAIN TRUJILLO

JUDGMENT AND PROBATION
COMMITMENT ORDER

COUNSEL in the presence of the attorney for the government the defendant appeared in person on this date at Raleigh, N.C., November 9, 1987.

☒ WITH COUNSEL Jeffrey L. Zimmer & Robert M. Leen—Private

PLEA ☒ NOT GUILTY

FINDINGS &
JUDGMENT There being a verdict of ☒ GUILTY, by the jury in Cts. 2, 4 & 5 on September 2, 1987. Motion for Judgment of Acquittal allowed as to Ct. 1 on September 1, 1987.

Defendant has been convicted as charged of the offense(s) of aviation smuggling of cocaine—19 U.S.C., § 1590 and 18 U.S.C., § 2, as charged in Count 2; possession of over 5 kilograms of cocaine on an aircraft with intent to distribute—21 U.S.C.,

§§ 959 (b) (2) & 960, as charged in Count 4; and attempt to import over 5 kilograms of cocaine—21 U.S.C., §§ 963 & 960, as charged in Count 5.

* * * *

SENTENCE OR
PROBATION ORDER

COUNT 2—Five (5) years—defendant pay a special assessment in the amount of $50.00.

COUNT 4—Ten (10) years—sentence on Count 4—to run consecutively to the sentence imposed on Count 2—defendant serve a term of 5 years supervised release. Defendant is to pay a fine in the amount of $25,000.00, which shall bear interest at the rate of 1.5% per month on the unpaid balance, and shall pay a special assessment in the amount of $50.00.

COUNT 5—Five (5) years—sentence to run concurrently with the sentence imposed on Count 2—defendant to pay a special assessment in the amount of $50.00.

SPECIAL CONDITIONS
OF PROBATION

The Court orders that the defendant be given credit for time served in jail pending sentencing.

* * * *

/s/ W. Earl Britt
W. EARL BRITT

By /s/ [Illegible]
Deputy Clerk

November 9, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

87-15-01-CR-7
87-15-02-CR-7

UNITED STATES OF AMERICA,
Plaintiff,

VS.

JOHN CARLOS MASSUET
CARLOS EFRAIN TRUJILLO,
Defendants.

SENTENCING—AT RALEIGH
NOVEMBER 9, 1987
BEFORE THE HONORABLE W. EARL BRITT

For the Government:

MR. DOUG MCCULLOUGH
Acting United States Attorney

By: MS. CHRISTINE DEAN
Assistant United States Attorney
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For the Defendant Trujillo:

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For the Defendant Massuet:

MR. JOHN M. MACDANIEL
Attorney at Law
75 S.W. 8th St., Suite 302
Miami, FL 33130

* * * *

[19] THE COURT: All right. Mr. Trujillo, stand up, please.

[20] Madam Clerk, on the finding of guilt by the jury in count two, it is adjudged that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of five years, and that he pay a special assessment in the amount of fifty dollars.

Upon the finding of guilt by the jury on count four, it is adjudged that the defendant be hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of ten years. The sentence on count four to run consecutively to the sentence on count two. That the defendant pay a fine in the amount of twenty-five thousand dollars, which will bear interest at the rate of one point five percent per month until paid. That the defendant pay a special assessment in the amount of fifty dollars. That the defendant serve a term of supervised release for five years.

Upon the finding by the jury of guilt on count five, it is adjudged that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of five years. Sentence on count five to run concurrently

with the sentences imposed in counts two and four. Further ordered the defendant pay a special assessment on this [21] count in the amount of fifty dollars and also, it's not necessary, the court orders that the defendant be given credit for time served in jail pending sentence.

Mr. Trujillo, I advise you, sir, that you have a right to appeal to the United States Court of Appeals for the Fourth Circuit from the sentence which I have just imposed upon you. If you cannot afford an attorney, one will be appointed for you. You may be seated.

MR. LEEN: Your Honor, may I ask the court a point of clarification?

THE COURT: Yes.

MR. LEEN: You've made count five concurrent with counts two and four but you made count four, as I understood it, consecutive to count two. Did you mean that count five should be served commencing when count two begins or commencing when count four begins?

THE COURT: I guess that's probably well taken. Let it read, Madam Clerk, that the sentence on count five will run concurrently with the sentence imposed on count two.

MR. LEEN: Thank you, sir. Is Your Honor—may I ask another thing?

THE COURT: Yes.

MR. LEEN: Has Your Honor considered and denied our motion as to the legality of any sentence being imposed [22] on count four?

THE COURT: I'm not sure I understand you.

MR. LEEN: We had filed a motion asking the court—

THE COURT: Oh, your motion that there's no sentence at all that can be imposed; yes, that motion is denied.

MR. LEEN: And do you feel that this sentence that has been imposed on count four then carries the no parole and all of the provisions that go with a 960(b) type of sentence?

THE COURT: Well, the sentence imposed is a sentence being imposed in my discretion and not because of any mandatory minimum required by the statute. If that answers the question.

MR. LEEN: Okay. It's a discretionary sentence, as you see it?

THE COURT: Yes.

MR. LEEN: Thank you very much, sir.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WILMINGTON DIVISION

Nos. 87-15-01-CR-7
87-15-02-CR-7

UNITED STATES OF AMERICA

v.

JOHN CARLOS MASSUET and
CARLOS EFRAIN TRUJILLO

JURY TRIAL
BEFORE THE HONORABLE W. EARL BRITT,
CHIEF UNITED STATES DISTRICT JUDGE

JURY CHARGE

APPEARANCES:

For the Government:

SAMUEL T. CURRIN
United States Attorney

By: CHRISTINE WITCOVER DEAN
Assistant U.S. Attorney

For Defendant Massuet:

JOHN M. MACDANIEL, ESQUIRE

For Defendant Trujillo:

ROBERT M. LEAN, ESQUIRE
JEFFREY L. ZIMMER, ESQUIRE

AT WILMINGTON
AUGUST 31—SEPTEMBER 2, 1987

* * * *

[15] Count Three relates only to the defendant, John Carlos Massuet and Count Four relates only to the defendant, Carlos Efrain Trujillo.

The third count charges that on or about 1 June 1987 the defendant Massuet, being a United States citizen on board an aircraft, did unlawfully, knowingly and intentionally possess with intent to distribute a Schedule II narcotic controlled substance, being cocaine, in violation of Title 21, United States Code, Section 959(b)(2).

The fourth count charges that on or about 1 June 1987 the defendant Trujillo, being on board an aircraft registered in the United States, did unlawfully, knowingly and intentionally possess with intent to distribute a Schedule II [16] narcotic controlled substance, being cocaine, in violation of that same statute, Title 21, United States Code, Section 959(b)(2).

That statute provides in pertinent part that it shall be unlawful for any United States citizen on board any aircraft or any person on board an aircraft registered in the United States to possess a controlled substance with intent to distribute it.

Cocaine is a controlled substance within the meaning of this law.

The Government is not required to show that the defendants knew that the substance was cocaine. It is sufficient if the evidence establishes beyond a reasonable doubt that the defendant possessed some controlled substance with the intent to distribute it.

In the case of a United States citizen, the defendant can be found guilty of this offense only if all of the following facts are proved beyond a reasonable doubt:

First, that the defendant you are considering is a United States citizen;

Second, that the defendant you are considering was on board an aircraft; and

Third, that he possessed the substance with the intent to distribute it.

In the case of a non-United States citizen, the [17] defendant can be found guilty of this offense only if all of the following facts are proved beyond a reasonable doubt:

First, that the defendant you are considering was not a United States citizen;

Second, that the defendant you are considering was on board an aircraft owned by a United States citizen or the aircraft was registered in the United States; and

Third, that he possessed the substance with the intent to distribute it.

To possess with intent to distribute simply means to possess with intent to deliver or transfer possession of a controlled substance to another person with or without any financial interest in the transaction.

Such possession does not necessarily mean actual physical possession, nor is ownership necessarily involved since one may be in possession of property which he does not own.

Possession here is the exercise of dominion and control over the property with knowledge of its nature. Moreover, such dominion and control need not be exclusively in the defendant, but it is sufficient if he exercises dominion and control over the cocaine together with other persons.

One possesses an article with the intent to distribute it when that person does not plan to keep all of that article for his own personal use.

[18] In other words, if you find that the defendant did possess an amount of cocaine and did not intend to keep

all of the cocaine for his own personal use, but rather intended to transfer some or all of it to another individual, not a lawful authority, then he possessed cocaine with the intent to distribute it.

On the other hand, if you find that the defendant never intended to transfer any amount of cocaine, then he did not possess it with the intent to distribute it.

You may take into consideration on the issue of intent to distribute the amount, quantity and value of the cocaine involved.

And so, members of the jury, as to Count Three, if you find from the evidence and beyond a reasonable doubt:

First, that the defendant Massuet is a United States citizen;

Second, that the defendant Massuet was on board an aircraft; and

Third, that he possessed cocaine with the intent to distribute it;

Then it would be your duty to find the defendant Massuet guilty of Count Three.

If you fail to so find from the evidence and beyond a reasonable doubt, then you must find him not guilty.

[19] As to Count Four, if you find from the evidence and beyond a reasonable doubt:

First, that the defendant Trujillo was not a United States citizen;

Second, that he was on board an aircraft owned by a United States citizen or the aircraft was registered in the United States; and

Third, that he possessed cocaine with intent to distribute it;

Then it would be your duty to find the defendant Trujillo guilty of Count Four.

If you fail to so find from the evidence and beyond a reasonable doubt, then you must find him not guilty.

* * * *